

**New Castle City Board of Adjustment Meeting Minutes**  
**Meeting via Zoom**  
**August 19, 2020 – 6:30 p.m.**  
**City of New Castle Town Hall**

**Members Present:**     **Mayor Michael J. Quaranta**  
                                  **Daniel R. Losco, Esq., City Solicitor**  
                                  **David J. Athey, City Engineer**

**Also Present:**         **Jeff Bergstrom, City Building Official**

Mayor Quaranta convened the meeting at 6:35 pm and introduced the Board members.

An application has been filed by Centerpoint 2001, LLC & Centerpoint 2021, LLC, 1201 N. Market Street; Suite 400, Wilmington DE 19801 (Owner and Applicant), for a variance from Section 230-28(G)(1) of the City of New Castle Code to permit the construction of a 26 inch continuous evergreen hedge along Johnson Way without steel ornamental fencing where the City of New Castle Code requires steel ornamental fencing in addition to the evergreen hedge, and a variance from Section 230-28(G)(2) of the City of New Castle Code to permit installation of thirteen (13) 1.5 to 2 inch caliper shade trees where the City of New Castle Code requires forty-nine (49) 4-inch caliper shade trees for properties located at 1401, 1501 & 1521 Johnson Way, New Castle, Delaware, Tax Parcel No's. 21-013.00-106, 21-013.00-030 and 21-013.00--119.

Mayor Quaranta stated that the Application was posted on August 4, 2020, and was properly noticed in the News Journal and the New Castle Weekly.

Messrs. Mark Ziegler, Michael McConnell and Gary Burcham were sworn in by Mr. Losco.

Shawn Tucker, Esquire, representative for the Applicant, gave a history of the Application, stating that the Applicant first presented a by-right plan for construction of a parking lot in the Industrial Park (Lot A) to the Planning Commission on July 27, 2020. He noted that the Planning Commission has authority to approve parking lots for both residential and non-residential developments. The way the Code is written it seems to be contemplating new parking lots when a new project is being built. In the case before the Board, an existing tenant's needs have changed and requires additional parking in an existing industrial park. The tenant's busiest season is fast approaching, which makes the timing for a new parking lot more imperative.

The Planning Commission supported and approved the by-right plan for Lot A; however, the authority to grant variances from the by-right plan is vested in the Board of Adjustment.

Mr. Tucker stated that it became very clear that neighbors located immediately to the south in Washington Park were upset by the construction necessary to relocate the stormwater treatment facility to Lot C and build the new parking lot on Lot A. He added that the Code does not require a significant amount of buffering, nor is significant landscaping required for open spaces, i.e., stormwater management facilities.

Mr. Tucker explained that the Applicant saw an opportunity to take certain landscaping requirements being imposed in the industrial park and relocate them to enhance buffering against the residential neighbors to the south. The idea grew from two factors: (1) the neighbors were upset and wanted resolution to the buffering (which was not required by Code); and (2) there is no ornamental fencing anywhere else in the park.

The Code requires 4" caliper trees for new parking lots, and ornamental fencing or walls that will provide very little benefit to the industrial park. The Applicant feels there is an opportunity to address a real concern from neighbors who would benefit from buffering being moved to Lots B and C.

Mr. Tucker stated that the Applicant has been working closely with the community neighbors, many of whom testified before the Planning Commission and are in attendance at tonight's meeting. He added that procedurally the Planning Commission approved the by-right plan; and also recommended to the Board of Adjustment to consider the variances which would reduce plantings and eliminate the requirement for the ornamental fencing on Lot A, which would allow the Applicant to build an additional 16 parking spaces for the tenant and relocate landscaping to the southeast across Lots B and C which would significantly benefit the neighbors.

Mr. Tucker added that the variances address not only the Applicant's needs, but a community need as well.

Mr. Tucker explained that in the presentation, Lot A is the area for the proposed new parking lot approved by the Planning Commission, Lot B is an existing parking lot, and Lot C is the area containing an existing and newly constructed stormwater management ponds. He added that a stormwater management pond that previously existed on Lot A was removed and relocated to Lot C. Mr. Tucker also explained the physical layout of the site for the Board. He noted that Lot C did have a significant amount of vegetation prior to construction of the new stormwater management pond and said the removal of that vegetation was a shock to the neighbors. Mr. Tucker stated that Lot A is the subject of the Application, but Lots B and C are relevant in terms of the neighborhood buffering being proposed by the Applicant.

Mr. Tucker concluded his overview and introduced Mr. Mark Ziegler, Professional Engineer at McBride & Ziegler, Inc. Through questions from Mr. Tucker, Mr. Ziegler testified that:

- He is a professional engineer licensed in the state of Delaware and has been employed as such for 33 years.
- McBride & Ziegler prepared the site construction plans for the parking lot on Lot A of the industrial park.
- Burcham & Associates, Landscape Architects, were consulted relative to preparation of the Plan.
- The Applicant is seeking two variances:
  1. A variance from §230-28(G)(1) to construct a 26" continuous evergreen hedge along Johnson Way without a steel ornamental fence where the Code requires an

ornamental fence. Mr. Ziegler identified where the ornamental fence would be constructed on the by-right plan.

2. A variance from §230-28(G)(2) to permit installation of 13 1-1/5-2" caliper shade trees where the Code requires 49 4" caliper shade trees. Mr. Ziegler identified the location of the plantings.
- Ornamental steel fencing does not appear in any other area of the industrial park.

Mr. Ziegler stated the Applicant is proposing to eliminate the ornamental fence along Johnson Way and reduce the number of plantings in Lot A; and to install a 6' high wood or vinyl fence and landscaping along Lot B and landscaping along Lot C that is not required by Code, to buffer residential properties adjacent to the industrial park. It was clarified that the 6' high fence would be installed approximately 5' off the edge of parking and vegetation would be planted between the fence and the property line of residential properties in Washington Park along Lot B. It was further clarified that along Lot C there will be a double line of landscaping, but no fence. The Applicant discussed fencing with residents of Washington Park, and their preference is for a 6' high, vinyl, earth-tone color fence.

Mr. Tucker introduced Mr. Gary Burcham, Registered Landscape Architect of Burcham & Associates to explain the proposed landscaping, including the number of plantings, species, and the reason for the double plantings along Lot C. Mr. Burcham stated he is a Registered Landscape Architect in the State of Delaware, and has operated Burcham & Associates since 1989. Mr. Burcham explained the alternate landscape plan. He noted that along Lot B, there is an elevational difference of approximately 5' and what the neighbors will see from the property line is the fence broken up visually by plantings. The 6' high fence will be augmented by the elevational difference so from the property line, one will look up approximately 11' to the top of the fence.

Mr. Burcham stated a double line of screening composed largely of non-deciduous native species will be planted along Lot C. The proposed species are Norway Spruce, Eastern White Pine, and Loblolly Pine. Closer to the stormwater management pond, the native species proposed are Short Leaf Pine and Virginia Pine, which should thrive in that area. In response to a question from Mayor Quaranta, Mr. Burcham stated that if the trees are in good health, they should not topple in strong winds. The goal is to create a dense visual screen that over time will virtually obscure any view into the industrial park from the neighboring properties. He added that some evergreen screening is being done to the left side of Lot A in addition to trees within and at the entrance of the parking lot. Mr. Burcham summarized that the Applicant is proposing 101 evergreen trees in addition to the 13 shade trees and evergreen edging along Johnson Way.

Relative to the size of the trees, Mr. Burcham stated that he would not recommend planting 4" caliper trees as required by Code. He explained that because a significant portion of the root system of a transplanted tree is severed it may have an insufficient root system re-establish itself, thereby increasing the chances the tree will die. Mr. Burcham provided additional statistics, including the differences in the 4" and 1-1/2"-2" caliper tree relative to re-establishment and regrowth, and the size of both the root ball and transplant pit.

In response to a question from Mayor Quaranta, Mr. Burcham explained the new trees would be approximately 5'-6' tall, and the all species will grow 1'-2' per year. The Mayor asked if the Leyland Cypress was being considered and Mr. Burcham stated that after discussions with the neighbors, the Leyland Cypress, which grows 2'-3' per year, may be planted closest to the property lines.

In response to questions from Mr. Tucker, Mr. Burcham said there is very little value in an ornamental fence along Johnson Way, and no other areas of the industrial park have one. He added that the Code requirements make sense in certain parts of the City, but not in an industrial park. Visually screening Lots A, B and C with fencing and landscaping will address concerns of the neighbors, will provide sound reduction, and will benefit the community at large.

Mr. Burcham also noted that Mr. McConnell has agreed to install light cutoffs in Lot A and retrofit light cutoffs in Lot B to reduce light migration into neighboring yards.

Relative to utilities along Johnson Way and the location of the proposed fence in the by-right plan, Mr. Burcham noted that based on the proximity to existing utilities, if the fence is located downhill it is closer to utilities and could be damaged or have to be removed if the utility lines require work or repair. Conversely, if the fence is located closer to the parking lot, snow removal could cause damage over time if snow is piled next to the fence.

In response to a question from Mayor Quaranta, Mr. Losco stated §230-28(G) of the Code was adopted in 2004.

Mr. Athey asked if a location farther from Washington Park had been considered for the new stormwater management pond. Mr. Ziegler explained that the current site is the optimum location in order to get the capacity, stay above the flood plain, and avoid the wetlands in order to accommodate the 17 acres of water being diverted away from Washington Park. He added that DNREC and Soil Conservation Service were consulted and wholly embraced the relocation and the proposed site.

In response to a question from Mr. Tucker, Mr. Ziegler explained that there were ongoing issues with the stormwater management pond in Lot A resulting in flooding into Johnson Way and toward the ballfield. He opined that the relocation of the pond to Lot C is beneficial to the community and the City, noting that DNREC and Mr. Bergstrom were very pleased that 17 acres of water is being redirected away from Washington Park.

Mr. Tucker introduced Mr. Michael McConnell with McConnell Development. Through questioning, Mr. McConnell testified to the size, age, character, and development of the industrial park. Mr. McConnell stated that Lot A is being developed as a parking lot to accommodate Amazon, and noted that Amazon's busiest season runs from mid-October through January, and timing is critical to have the new parking lot completed. Mr. McConnell also testified the development of the industrial park was not subject to the Code requirements adopted

in 2004 and those requirements do not align with the character of the industrial park. The variances being sought will provide better functionality in the parking lot than the by-right plan, and there is no benefit to an ornamental fence. Additionally, Mr. McConnell stated that a 4" high pressure gas line, a 480 volt power lines, and a series of three other utilities run perpendicular at the site of the proposed fence.

In response to a question from Mayor Quaranta, Mr. McConnell stated he is not aware if Amazon plans to deploy electric vehicles at Centerpoint Industrial Park; however, the new parking lot does have the proper infrastructure if charging stations are required.

Mr. Tucker restated that the Planning Commission supported the alternative plan and encouraged the Applicant to continue working with the community, which the Applicant continues to do. Additionally, Mr. Tucker stated the Applicant has entered into private agreements with interested neighbors to:

- Provide additional plantings beyond what is provided for in the initial alternate landscape plan.
- Provide perpetual maintenance to repair/replace plantings if a tree dies or topples due to storm damage.
- Provide perpetual maintenance to repair/replace the fence along Lot B.

He added that the Applicant has acted in good faith and has worked hard with neighbors in Washington Park to address their concerns.

Mr. Tucker restated the variances requested on Lot A:

- Installation of a 26" continuous evergreen hedge along Johnson Way without ornamental fencing.
- Installation of 13 1.5"-2" caliper shade trees.

Relative to the legal standard/Kwik-Check, Mr. Tucker stated:

Nature of the zone

The site is zoned Industrial; the existing industrial park is built out; none of the park is subject to the requirements of the Code adopted in 2004; the ornamental fence is out of character of the industrial park; and the planned expansion is not contrary to the nature of the zone.

Character of immediate vicinity & uses therein

The character of the immediate vicinity is predominantly residential and open space to the east and industrial to the west. The parking lot will be visually screened from adjacent uses and a reduction in the number of plantings will not alter the character of the vicinity and surrounding uses in the industrial park; however the alternate landscape plan will greatly benefit residential neighbors.

Affect to neighboring property and uses

The alternate landscape plan offers significant benefit to the community by relocating plantings slated for Lot A to provide buffering to neighboring properties along Lots B and C, which is

otherwise not required by Code. The Applicant has entered into agreements with interested neighbors to provide additional plantings beyond what is proposed on the alternate landscape plan. A stormwater management pond was relocated from Lot A to Lot C that meets Code and benefits not only the community, but the City as well, by mitigating 17 acres of water away from Washington Park.

Unnecessary hardship or exceptional practical difficulty

The Applicant did not create the hardship. Denial of the variance will create an unnecessary hardship to Centerpoint Industrial Park by impeding its ability to make normal improvements to the property. In addition, denial of the variance may result in fewer living trees in the parking lot due to the fact that survivability of 4" caliper trees is much lower than that of younger, smaller trees.

Mr. Tucker opined that the approval of the requested variance benefits the Applicant in its support of the tenant; the neighbors by mitigating 17 acres of water from Washington Park and providing sufficient buffering from the industrial park; and the City by removing an insufficient stormwater management pond and building a stormwater pond that meets Code and provides mitigation of 17 acres of water away from Washington Park.

Mr. Tucker concluded his presentation and respectfully asked that the Board consider granting the two requested variances.

Mr. Bergstrom stated that in a 100 year storm the stormwater management pond built on Lot A was insufficient to handle the amount of water, which caused flooding. The new stormwater management pond rectifies this and is an asset to the City. Mr. Bergstrom stated the alternate landscape plan is beautiful; noting it will mitigate noise and light pollution. With regard to the ornamental fence Mr. Bergstrom opined it would be uncharacteristic of all other properties in the park. In response to a question from Mayor Quaranta, Mr. Bergstrom stated he has not received any input from the community, either pro or con, in over three weeks.

Mayor Quaranta asked if the private agreement regarding plantings includes all neighbors and if all neighbors will benefit equally. Mr. Tucker stated the adjacent neighbors were communicated to via FedEx offering the option to sign up to the private agreement, and everyone who wants to can be part of the agreement. The community leadership was encouraged to communicate the details of the agreement with residents of Washington Park. Mr. Tucker added that the Applicant currently has an agreement in spirit with residents, and a contractual private agreement will be executed. The agreement includes: Maintenance agreement in perpetuity; replacement of trees up to two times a year during planting season; and representation that Amazon will remind employees that they cannot park in the community and walk to work.

In response to a question from Mayor Quaranta, Mr. Tucker further stated:

- No signed returned agreements have been received.
- His Paralegal sent out a letter via FedEx to residents in Washington Park.

- Adjacent neighbors were encouraged to communicate the contents of the letter and agreement to other neighbors in Washington Park.
- Adjacent neighbors were invited to a meeting held in July to discuss the alternate landscape plan and plantings, which was attended by approximately 12 neighbors.
- To date, three neighbors have continued to engage the Applicant.
- Mr. Tucker represented in an email to the community leader the bullet points the Applicant has agreed to.
- The community leader indicated that there is general agreement in the community to the bullet points.
- The agreement will be formalized if there is a positive outcome of the Board of Adjustment meeting.

Mayor Quaranta clarified that if a neighbor does not communicate with Mr. Tucker they would still be entitled to the benefits of the plan. Mr. Tucker added he will send out another letter to the community detailing the latest plan.

There being no further questions from the Board, the Mayor opened the meeting to public comment.

### **Public Comment**

#### Philip Gross

Mr. Gross asked for clarification of the fencing and Mr. Tucker stated the fence is continuous along the rear of the existing parking lot (Lot B) and wrapping around towards Johnson Way approximately 30'. It does not extend across Lot C. He added that fencing is not required on Lot B, and landscaping is not required on Lot C.

Mr. Gross suggested that for safety and security Lot C should be fenced. Mr. Tucker stated DNREC discourages fencing around stormwater management ponds. The pond is benched for safety and was built pursuant to an approved DNREC plan.

Mr. Gross noted that only three neighbors have agreed to the private agreement and opined the agreement should cover all the residents of Washington Park. Mr. Tucker stated there were challenges meeting with the public due to COVID-19 and a communication was sent to the immediate neighbors via FedEx.

Mr. Gross suggested that in the final letter the residents are presented with dates to attend a Zoom meeting to ensure everyone is given the opportunity to meet.

Mr. Gross stated that because the additional plantings are in a private agreement and not on the Plan presented to the Board of Adjustment the Board is being asked to take it on faith that the Applicant will provide those plantings. Mr. Tucker offered to send a copy of the Agreement to Mr. Gross.



Angela Quinn

Ms. Quinn stated she supports granting the variances with trees and vegetation to be planted at the rear of Lots B and C. She provided background of her involvement with communications between the community and the Applicant and his attorney; confirmed that an agreement has been reached with the Applicant regarding additional landscaping beyond what is proposed in the alternate landscape plan; and light pollution from the parking lots is being addressed. She noted that prior to construction the adjacent neighbors had no view of the industrial park at all. She added that the neighbors are taking the Applicant's assurances to continue to work with the community on faith.

Mayor Quaranta asked Ms. Quinn if she is aware of how the neighbors are feeling. Ms. Quinn stated the neighbors were very upset at the onset of construction because there was no notice. She made reference to a number of residents that she has spoken to and those where notes were left notifying them of the meeting in July. She noted that there was flooding in Washington Park in the last storms and that is a concern. Mr. Bergstrom stated the project is not yet fully functional. Mr. Ziegler added that the pond is currently functioning as a sediment basin and it will be converted to a fully functional stormwater management basin shortly which will result in less water flowing into Washington Park.

In response to a question from Mr. Losco, Ms. Quinn stated that Washington Park does not have an organized Civic or Community Association. Mr. Losco suggested the community may want to consider forming an Association as they negotiate the agreement with the Applicant.

There being no further public comment, Mr. Losco made a Motion to move to the Business Meeting. The Motion was seconded and unanimously approved.

**Business Meeting**

Mr. Losco stated the Board should be looking at the Kwik-Check standard and the Code standard. He opined that Mr. Tucker's memorandum addressed those standards very well.

He noted the nature of the zone is industrial; the character to the east is residential; the rest faces a fully developed industrial park that does not have the ornamental fences or the landscaping that goes with it; and the elimination of the ornamental fencing will not affect the rest of the industrial park.

He stated it is a rare case where every party connected with the variance request wins on multiple fronts:

- It improves drainage;
- It improves screening;
- It suppresses noise;
- It provides enhanced parking for the tenant;
- The fencing as described with supplemental evergreen landscaping at the rear of Lot A provides excellent screening and will be much more effective than having a fence in the front of the lot;



- The other landscaping provided on Lots B and C is not required by Code, but will provide an adequate and necessary buffer for the residents of Washington Park;
- The Industrial Park predates the adoption of the 2004 Code Amendment; the Board is not granting any special privileges to the Applicant; and none of the other tenants were required to install ornamental fencing in front of their parking lots;
- The need for the variances does not arise from any actions of the Applicant;
- A literal interpretation of the Chapter would deprive the Applicant of rights enjoyed by other properties in the same District; and
- The unnecessary hardship or exceptional practical difficulty standard was the most challenging part of the legal standard to address; however, the description of the problem of the fencing along Johnson Way interfering with existing heavy utility lines or interfering with snow plow efforts if the fence is moved back, creates the reasonable, exceptional practical difficulty that justifies the variance.

In conclusion, Mr. Losco stated he will support both variance Applications. He suggested that approval be conditioned on the implementation of the alternate landscape plan as submitted by the Applicant.

Mr. Athey recognized that the drainage issues in Washington Park are well known. He stated the alternate landscape plan is better for the residents of Washington Park and the ornamental fencing would be out of place in Centerpoint Industrial Park.

He added that he has concerns with the Board setting a precedent by allowing the Applicant to simply state their alternative plan is better than the by-right plan. Relative to the 4" caliper tree, he agrees there is validity to the Applicant's argument that the better size would be 1-1/2"-2" caliper trees; and suggested that might be an area of the Code the City might consider reviewing. Despite the fact that he agrees with the Applicant, he restated his concern that the Board could set a precedent whereby future Applicants will have a professional who disagrees with the Code or who feels he can do a better job, which could put the Board of Adjustment in a difficult position.

Mr. Athey stated the relevant portion of the Code was adopted in 2004, and therefore, a property built prior to that time is trying to conform to the current Code. He further stated that "hardship" is not defined in the Code and by not approving the variance the Board could be creating a hardship on the residents of Washington Park, who clearly benefit by an approval. Similarly, the Code states the Board should not approve any variance that would be contrary to the public interest and by not approving the variance the Board could be creating a situation that is contrary to the public interest.

In conclusion, Mr. Athey stated that although he is concerned about setting a precedent, he supports both variance Applications. He added that approval should be conditioned on a landscape plan being approved by Mr. Bergstrom.

Mayor Quaranta stated the Kwik-Check case has been met; the alternative landscape plan is far superior; and the neighbors who have been engaged find it far improved from the by-right plan. He recommended the City Solicitor bring to City Council a suggestion to review the Code and make necessary changes. He also stated the benefit to the residents in terms of water remediation is long overdue and the creation of the new stormwater management facility is a vast improvement. He added the Board should be very deliberative about the Applicant identifying the affected property owners sending them a communication to update them on the status of the project and inform them of the benefits to which they are entitled; and that there is a limited time for them to express their opinions or to ask questions.

In conclusion, Mayor Quaranta stated that he supports both variance Applications.

Mr. Losco made a Motion to approve both variances conditioned upon implementation of the landscape plan submitted by the applicant tonight in substantial form approved by Mr. Bergstrom.

Mr. Athey questioned the use of the word “implementation” which he feels implies the Applicant must actually start planting, and stated he would be comfortable simply with an approval of a plan. Mr. Losco noted “implementation” does not mean “immediate implementation”; however, he stated he would be open to suggestion for an amendment and proposed Mr. Athey restate the Motion.

Mr. Athey made a Motion to approve both variances as presented conditioned upon approval of an alternate landscape plan by the Building Official substantially in conformance with the alternate landscape plan submitted by the Applicant.

Mr. Losco withdrew his Motion and seconded Mr. Athey’s Motion.

Mayor Quaranta asked for an amendment to the Motion to add that the Applicant further agrees to communicate with adjacent property owners in Washington Park, provide them with an update, and give them an opportunity to comment on the plan and any private agreements that need their consideration.

Mr. Athey stated that although he agreed with the spirit of the amendment, he felt that whereas the other condition was very clearly defined, the Mayor’s amendment seems to have some subjectivity and asked if he could identify “property owners” more specifically. The Mayor clarified his amendment and explained he meant adjacent property owners in Washington Park.

Mr. Losco suggested that Mr. Athey’s Motion not be amended further. He stated that Mr. Bergstrom knows the community is very interested in the landscape plan and is sure he will dialogue with them and communicate with them before any landscape plan is approved.

Mayor Quaranta withdrew his amendment to Mr. Athey’s Motion.

On vote:

Mr. Losco stated he votes in favor of the Motion for all the reasons he previously stated.

Mr. Athey stated he votes in favor of the Motion for all the reasons he previously stated.

Mayor Quaranta stated he votes in favor of the Motion for all the reasons he previously stated.

The Motion carried by a vote of three (3) in favor and none opposed.

There being no further business to discuss, Mayor Quaranta called for a Motion to Adjourn.

Mr. Athey made a Motion to adjourn the meeting. The Motion was seconded by Mr. Losco. On vote, the Motion was unanimously approved and the meeting adjourned at 8:48 p.m.

Kathy Weirich  
Stenographer